



# President's Council on Integrity and Efficiency

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Testimony of  
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Before the  
Committee on Governmental Affairs  
United States Senate

Regarding  
Legislative Proposals and Operational Issues  
Relevant to the Inspector General Community

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss legislative proposals and issues relevant to the operations of the IG community. I am the Inspector General (IG) of the Federal Deposit Insurance Corporation (FDIC) and currently the Vice Chair of the President's Council on Integrity and Efficiency (PCIE). Joining me today is the Honorable Patrick McFarland, IG for the Office of Personnel Management, and the Honorable Kenneth Mead, IG for the Department of Transportation. We thank the Governmental Affairs Committee for its longstanding, bipartisan support. Over the years, we have worked with this Committee on a wide range of government management issues and stand ready to assist the Committee in carrying out its legislative and oversight functions.

By way of background, I assumed the role of the PCIE Vice Chair in May 1999. The PCIE was created by Executive Order in 1981 to provide a forum for the Presidentially appointed (PAS) IGs and others to work together and coordinate their professional activities. The Council is chaired by the Deputy Director for Management at Office of Management and Budget (OMB). Other members include the Controller of the Office of Federal Financial Management at OMB, the Special Counsel of the Office of Special Counsel (OSC), the Director of the Office of Government Ethics (OGE), the Deputy Director of OPM, and a representative of the Director of the Federal Bureau of Investigation (FBI).

Over the years, the PCIE has established various committees and other mechanisms to better accomplish the needs of its community. Today, the PCIE has six standing committees, which include Audit, Inspections and Evaluations, Investigation, Integrity, Legislation, and Professional Development, and two roundtables to stay apprised of government-wide issues. Both the Government Performance and Results Act (GPRA) Roundtable and the Information Technology Roundtable provide opportunities for the IG community to stay abreast of pertinent issues and share best practices on these two enormous initiatives aimed at improving government programs and initiatives.

Mr. McFarland chairs the PCIE Investigation Committee and is prepared to discuss the need for statutory law enforcement and any other investigation issues. Mr. Mead heads up the PCIE Legislation Committee and has worked extensively with your Committee staff over the past 2 years on legislative matters affecting the IG community on IG Act amendments and other proposed pieces of legislation.

## **Background and Accomplishments**

Twenty-two years ago this Committee developed the IG concept into legislation that became the IG Act. While the Act has been amended several times over the years to add new IGs and clarify reporting requirements, the basic tenets of the Act's intended mission have remained constant and strong. The Act charges IGs to independently (1) conduct and supervise audits and investigations relating to the programs and operations of their agencies as well as reviewing related legislation and regulations; (2) provide leadership for activities designed to promote economy, effectiveness, and efficiency and fight fraud, waste, abuse in their agencies; and (3) keep agency heads and the Congress informed of problems. Simply put, the role of the IG is to protect the integrity of government programs through traditional audits to improve program effectiveness and through criminal investigations to prevent and detect fraud, waste, and abuse.

The PCIE and Executive Council on Integrity and Efficiency (ECIE), which serves a parallel mission as the PCIE for the designated Federal entity (DFE) IGs, recently issued the *Progress Report to the President for Fiscal Year 1999*, which highlighted the community's many accomplishments over a 12-month period. The report details the pivotal role the IGs assumed in mitigating the risks associated with the Year 2000 (Y2K) computing problem and focusing unparalleled attention on information technology issues. Through hundreds of independent and objective audits, evaluations, inspections, and investigations of Federal programs and activities, the 58 IGs effectively promoted financial management accountability, helped ensure integrity, and minimized risks of fraud and abuse. The community as a whole identified potential savings of more than \$8.2 billion; took actions to recover over \$4 billion; and was instrumental in over 13,000 successful prosecutions, suspensions or debarments of nearly 6,700 individuals or businesses, and over 1,200 civil actions.

Of particular interest to the Committee is our ongoing work to audit agency financial statements under the Chief Financial Officers (CFO) Act and our continuing work to report on agency compliance with the implementation of GPRA. Moreover, we were pleased to work closely with you on S.1993, the Government Information Security Act of 1999, to enhance the Federal government's ability to combat computer hacking and intrusions.

Having just highlighted some of our many accomplishments, I along with my colleagues within the community recognize that we cannot sit back and rest on our laurels. We must be constantly looking for ways to improve our operations and be mindful that our integrity and credibility is of the utmost importance to remain effective in our position. Today, as Vice Chair of the PCIE and IG for the FDIC, I am prepared to discuss some legislative items currently under consideration, which could afford opportunities for the community to enhance its effectiveness.

### **Statutory Law Enforcement Authority**

Mr. Chairman, earlier this year, the Department of Justice submitted to the Congress a legislative proposal that would amend the IG Act to authorize criminal investigators in the offices of 23 Presidentially-appointed IGs to exercise law enforcement powers--namely authority to seek and execute search and arrest warrants, make an arrest without a warrant for offenses committed in their presence, and to carry a firearm--in the course of their official duties.

It is important that we emphasize that this grant of statutory law enforcement authority would extend no new authorities, but would simply recognize in statute authorities that are already being exercised. Criminal investigators in the covered OIGs have exercised law enforcement powers for many years through deputation as Special Deputy U.S. Marshals. Beginning in the mid-1980's, the Department of Justice approved this deputation on a case-by-case basis. As the role of IGs evolved, the need for such appointments was so consistent and the volume of requests so large that blanket deputation evolved. In 1996, OIG criminal investigators began exercising law enforcement authority under office-wide deputations.

Although OIGs are already exercising law enforcement powers, both the Department of Justice and the OIGs believe that statutory recognition of this authority is vital. Under the current arrangement, the U.S. Marshal's Service confers law enforcement authority upon over 2,500

OIG agents across the Federal government. However, day-to-day supervision and control over the exercise of those authorities rests with each IG. The Marshals cannot and do not monitor the thousands of pending OIG investigations in which law enforcement authorities are being exercised. The proposed statutory grant of law enforcement authority would appropriately place all responsibility for law enforcement authorities to the IGs, themselves, with important oversight by and accountability to the Attorney General.

Mr. Chairman, representatives of the IG community have been meeting with congressional staff members to discuss statutory law enforcement authority. During these discussions, some concern has been expressed that a statutory grant of authority -- instead of a renewable administrative deputation--might result in *decreased* oversight of law enforcement. Exactly the opposite is true.

First, under the bill, law enforcement powers must be exercised in accordance with guidelines promulgated by the Attorney General. These guidelines govern issues such as use of force, consensual interception of communications, coordination with other federal investigators and prosecutors, adherence to personnel and training standards, and periodic reporting. Where an IG fails to adhere to guidelines for exercise of law enforcement authorities, the Attorney General is authorized to suspend or rescind such authorities. Thus, the Justice Department retains ultimate oversight of the exercise of law enforcement powers and ensures greater consistency.

In addition, for the first time, IGs would be subject to "peer reviews" of their exercise of law enforcement powers, to be conducted by another IG or committee of IGs. The results of each review will be communicated directly to the Attorney General. With these guidelines and peer reviews, the Justice Department's bill would actually result in *enhanced* accountability by OIGs in their exercise of law enforcement authorities.

A statutory grant of authority would also provide certainty and permanence for OIG enforcement activities. The OIGs regularly conduct complex investigations that require the ongoing exercise of law enforcement authority (arrests, search warrants, and undercover activities) during investigations that often last for years. As members of numerous national and local task forces, other Federal, state and local law enforcement officers depend on OIGs' uninterrupted participation in the enforcement activities of the task force. Administrative deputations, which must be periodically renewed, cannot offer such a guarantee of continuity.

In this regard, we have learned that the Justice Department intends to not renew OIG blanket deputation authorities after January 31, 2001. If blanket deputation to the 23 OIGs covered in the bill were terminated, without passage of a statute granting law enforcement authority to IGs, it would jeopardize literally thousands of open investigations of fraud against agency programs across government. Investigations of fraud in health care, federal procurement, telecommunications, federal construction, bribery of public officials, crimes in subsidized housing, corruption in highway construction, child support enforcement, and a host of other cases would simply cease. Moreover, if we were forced to return to a process in which we sought deputation for each individual case, the administrative burden for both the Department of Justice and the IGs would, indeed, be enormous. We ask that the Congress foreclose this possibility with a grant of statutory law enforcement.

Statutory law enforcement authority would also be consistent with and promote the continued independence of the IGs. Under the current arrangement, delay or non-renewal of a deputation could be perceived as an attempt to influence an OIG, or even derail an investigation. We emphasize that we know of no instance in which such interference has occurred; however, a statutory grant would eliminate this perception.

The Department of Justice's legislative proposal would also ensure the consistency of law enforcement powers among OIGs. Some IGs already exercise law enforcement powers under statutory authority unique to their offices (e.g., the OIGs at the Departments of Defense and Agriculture, and the Treasury IG for Tax Administration). Pending bills would confer law enforcement authority on other specific OIGs. The proposal sent by the Justice Department would ensure that IGs operate under the same law enforcement authority and with the same accountability and oversight.

Congressional staff have also asked whether the proposed legislation would broaden the authority of the IGs or expand the categories of those authorized to exercise law enforcement powers. It would not. Law enforcement authority could only be exercised by trained, qualified law enforcement officers who report to the Assistant IG for Investigations (auditors could not exercise these authorities), and only in connection with investigations that are already within the jurisdiction of the IG to conduct. Thus, the bill would have no impact on the jurisdiction of the various IGs. Moreover, the bill would carry with it no additional costs since OIG agents are already exercising these authorities, are already fully trained in their exercise, and are already federal law enforcement officers for purposes of the law enforcement retirement system, and otherwise.

The OIGs have achieved impressive successes in law enforcement. We regularly face situations that pose dangers to ourselves, our fellow law enforcement officers, and members of the public. For many years, we have exercised law enforcement authorities to further our statutory responsibilities to investigate fraud in our respective agency programs and operations. We have achieved these successes with an impressive record of professional and responsible conduct. The Department of Justice has recognized this evolving role of IGs by submitting to the Congress a legislative proposal that offers reliable, permanent law enforcement authorities to qualifying OIGs. On behalf of the entire OIG community, we urge you to endorse this proposal.

### **Amendments to the IG Act**

I am pleased to comment on S. 870, IG Act Amendments of 1999, sponsored by Senator Susan Collins (R-ME) and under consideration by this Committee. In introducing this legislation earlier this year, Senator Collins referred to the IGs as "an already invaluable program" and noted our performance and many accomplishments over the years. She also challenged her colleagues and the IG community as a whole to build on its strengths and remedy its weaknesses. I fully subscribe to this strategy and look forward to working with her and her staff to respond to this challenge.

The Chair of the PCIE's Legislation Committee, Ken Mead, surveyed the community and provided written testimony on the previous version of Senator Collins' legislation in September 1998. We have just recently provided your staff with results of an updated survey on the revised bill introduced by Senator Collins during this Congress.

While there is a general consensus within the IG community in support of the underlying principles embodied in the legislation, I must note that consensus is different from unanimity. Our community consists of nearly 60 individuals, each with their own background and experience, interacting with agencies performing a wide variety of missions. On most matters, there are distinct minority viewpoints with suggestions that are worthy of consideration. We would welcome the opportunity to work further with your Committee and Senator Collins staff to share proposed technical changes that could improve our ability to better perform our mission.

At this time, I would like to briefly discuss the community's views on each section of Senator Collins' bill.

- **Renewable 9-year Term for PAS IGs:** There is general support throughout the IG community for some sort of fixed term, although there was no consensus as to the most desirable duration of that term. Most IGs felt that a fixed term would enhance independence and provide more continuity, particularly during changes of Administrations, although several expressed concerns that IGs might become lame ducks at the end of their terms or less aggressive in hope of securing reappointment. Others were concerned that a fixed term might cause an agency head to ignore or be unresponsive to OIG recommendations at the end of an IG's term. Several IGs who favored term limits also thought it important to add a complementary removal only "for cause" provision, such as malfeasance in office. It was noted that most term appointments have this protection, and even though a President must notify Congress when he/she removes an IG, in effect, IGs would still serve at the "pleasure" of the President. IGs felt a removal for cause provision would further enhance their independence and provide continuity, especially during changes of Administration.
- **Prohibition of Cash Bonus or Awards:** This section met with strong support from community members. Virtually all IGs are concerned about the appearance of impropriety associated with IGs accepting awards from the agency head over whom they exercise oversight. In response to a National Performance Review recommendation, the Clinton Administration implemented guidance to request PAS IGs drawn from the SES ranks to waive their rights to cash bonuses/awards determined by their agency head. As such, in January 1994, the IGs agreed to adhere to this policy and, to our knowledge, have not accepted any cash bonuses or awards.
- **External Reviews:** There is general support for the concept of external reviews in the areas identified so long as they did not overlap existing external audits and peer reviews, employed objective criteria, and would not be used primarily as a means to "second guess" an IG's mission-related decisions. A number of respondents desired that language be included to ensure that such reviews did not encompass management practices, operations, and procedures in the criminal investigative realm, particularly with respect to OIG and Justice Department coordination on prosecutorial decisions. Many IGs would rather incorporate these items into the current peer review process.
- **Annual Reports:** Most IGs favored moving to annual reports instead of the current semiannual framework. Some IGs, however, voiced concerns that annual publication would

make the reports stale and less useful to Congress. A vocal minority wanted to ensure that the semiannual reporting option was preserved subject to the discretion of the IGs. It may be best to simply require IGs to report to the Congress on at least an annual basis with discretion to report more frequently, if so desired. In addition, there were numerous suggestions regarding the contents of the report, the current requirements, and those new requirements contained in the proposed legislation.

- **Elevation to Executive Level III Salary:** The IGs strongly supported this provision to address the imbalances whereby senior level SES career employees, who receive cost-of-living adjustments and may be eligible for performance bonuses, may earn more than their PAS IG. Several IGs recommended that some allowance be made for IGs from non-Title 5 Legislative branch agencies, such as the General Accounting Office (GAO), to receive the same salary and benefits afforded to career civil servants. Since GAO is a fertile recruiting ground for IGs, candidates from their senior ranks often earn more than the salary level of an IG and may be forced to take a cut in pay if they were to assume the job.
- **Consolidation of Certain DFE OIG Functions:** This portion of the bill was the least well received and most controversial. Those opposed believed it important to have an IG physical presence in the smaller agencies and that size is not an adequate measure of the OIG's effectiveness or results. The ECIE has corresponded with Senator Collins to explain their concerns regarding consolidation, which I would like to share with the Committee for your reference and, as appropriate, inclusion as part of the hearing record.

### **Other Significant Issues Needing Legislative Action**

While we as a community have remained steadfast in accomplishing the responsibilities entrusted to us by the IG Act, the environment in which the IGs operate has changed dramatically since the passage of the Act. Over the past several years, the entire government has undergone change that has precluded the IGs ability to fully perform these responsibilities in the most efficient and effective manner. Detailed below are specifics on such issues needing legislative attention. One of these issues, which received strong bipartisan support, is already in the legislative process.

#### **Clarifying the Scope of IG Authority**

The IG Act provides very broad authority, imposing a duty to conduct "audits and investigations relating to the programs and operations" of the host establishment. The Inspectors General are further charged "to make such investigations and reports relating to the administration of the programs and operations ... as are in the judgement of the IG, necessary or desirable." Congress explicitly granted IGs the authority to issue subpoenas for the production of records and empowered IGs to take sworn testimony. Finally, Congress mandated that IGs are to expeditiously report to "the Attorney General whenever the IG has reasonable grounds to believe there has been a violation of Federal criminal law."

Despite what appears to be a rather unambiguous grant of authority from Congress, certain Justice Department Office of Legal Counsel opinions, notably the so-called Kmiec and Barr opinions, and certain decisions of Federal courts, notably the Fifth Circuit's decision in Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board,

983 F.2d 631 (5<sup>th</sup> Cir. 1993), construe the IG Act in ways which suggest that this authority may be limited. Courts are divided on the question of whether the IGs can investigate, for example, false statements made to federal agencies by those subject to their regulations, so-called third or external parties. We do note, however, that Deputy Attorney General Barr, in his Opinion of July 17, 1990, did acknowledge that IGs could exercise jurisdiction over an external party if it were the recipient of a non-monetary benefit from the agency, such as licenses or permits to operate.

Contrary to the plain language of the statute, some courts have narrowly construed the IG Act's grant of authority to allow investigations of a regulated entity only when they are direct recipients of federal funds, such as contractors or grantees. Under this view, IGs may not investigate criminal conduct of regulated entities even if the subject has engaged in criminal conduct to knowingly and intentionally deceive the agency. This could arise in situations where entities have received certificates or permits to operate-- but no direct agency funds-- in return for agreeing to abide by and periodically report on compliance with law and agency regulations.

My colleague from DOT, who accompanies me today, has been engaged on this issue over some time with mixed results. The Courts have split on whether he can investigate criminal violations, such as false certifications, conspiracy, and mail and wire fraud made to the Department by motor carriers subject to DOT regulations and registration requirements, including the number of hours they are permitted to be on the road each day. Fortunately, Congress saw fit to clarify this matter last year and ensure that the DOT Inspector General has such authority as part of the Motor Carrier Safety Improvement Act of 1999 (Public Law 106-159), which created a new Administration within DOT whose primary mission is truck safety.

Given the importance of protecting our public health, safety, and the environment, the IGs believe it is essential that they have unambiguous authority to investigate criminal violations of those who are subject to an agency's regulatory scheme, but who do not receive direct agency funding. It helps ensure the integrity of the underlying program and is an effective deterrent to those who intentionally seek to deceive the government--and the American people.

Though it never was enacted into law, this Committee passed such a clarification several years ago, which is provided below. We believe it may be time to revisit this issue again, and we would be pleased to work with you to advance this effort. That language read:

"The Inspector General Act of 1978 (5 U.S.C. App.) is amended by adding at the end thereof the following:

(e) (1) In carrying out duties and responsibilities under this Act, each Inspector General has authority to determine

(A) the persons subject to, and the nature, scope, and purposes of, audits and investigations conducted by the Inspector General relating to programs and operations administered, carried out, financed, or conducted by his or her establishment, including programs and operations under regulatory statutes; and

(B) the authority of the Inspector General to conduct those audits and investigations.

(2) The conduct of an audit or investigation by an Inspector General in accordance with this Act may not be construed as carrying out a program operating responsibility."

Alternatively, Section 2(1) of the Inspector General Act could be amended to add the following clause:

"including without limitation investigations into allegations that a person or entity subject to the laws and regulations of the agency or its operating administrations, whether or not that person or entity is a recipient of funds from that agency or its administrations, has engaged in fraudulent or other criminal activity in violation of Federal criminal statutes relating to the programs and operations of the agency or its operating administrations, or the laws and regulations administered or applied by the agency or its operating administrations."

### **Paperwork Reduction Requirement Regarding Surveys**

Numerous IGs are concerned that the review process requirements under the Paperwork Reduction Act (PRA) compromise the statutory mandate of an IG to be independent and nonpartisan. Further, many IGs feel strongly that these requirements affect their ability to carry out audits and evaluations required by Members of Congress, through law or by requests, in a timely and effective manner. While we certainly appreciate OMB's offer to work with us to create a practical solution to resolve our procedural concerns, the basic conflict between the two underlying laws still exists. To that end, we hope that this Committee would consider a legislative clarification.

In passing the IG Act, Congress charged IGs with the mission to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the host agency."

The purpose of such audits and investigations is to "promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud and abuse in, such programs and operations." By law, an IG must keep "the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action."

IGs are to be appointed by the President and confirmed by the Senate "without regard to political affiliation" solely on the basis of professional expertise. Moreover, IGs "shall not report to, or be subject to supervision by, any other officer" of the agency other than the head of the agency or the next senior officer, usually the Deputy. Significantly, agency heads shall not "prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."

The PRA requires that "collections of information" by a Federal agency, or the soliciting or obtaining of identical information from ten or more persons, be subject to review and approval initially from a "senior official" of the agency and later from OMB. The 1995 Amendments broadened the Act to ensure that all such "collections of information" were subject to this review process, except those conducted by independent regulatory agencies. *An exception exists for OIG investigations, but not for OIG activities generally.* Furthermore, although our auditing and evaluation roles are comparable in many respects, the Act does not apply to GAO.

The IG community remains sensitive to the issue of burdens on the public, as it has increasingly had to be receptive to numerous concerns by its many public constituencies and customers of its work product. There are, however, both process and substance implications involved for the Congress and the IG community.

For example, Congress often requires IGs, through law or by formal request, to conduct specific audits of agency programs in a very short timeframe. Part of the audit process may involve gathering information or other data from surveys of agency contractors, grantees, those entities subject to agency regulation, or the public. Subjecting such surveys to the review and approval process, even in the best of cases, could impact our ability to meet the tight deadlines required by Congress so it may conduct its legislative and oversight responsibilities in a timely fashion.

The substantive issue involves whether Congress intended that either departmental officials or OMB have authority over the OIG information collection efforts that are key to the performance of a successful audit. IGs recognize that OMB has an extensive wealth of knowledge in the formulation and conduct of surveys, and our community may wish to informally seek advice in the areas of survey formats, techniques, and methodologies. However, it is quite another matter for either the agency head or OMB to have the authority to either withhold approval of a proposed survey or alter its contents and questions. It allows these Offices to exercise some control over the type of audits an IG may perform, from whom an IG may collect information, and exactly when this may be accomplished. As I mentioned earlier, we are conversing with OMB to arrive at solutions to work within the confines of this statutory conflict. However, the conflict is real. As it stands, PRA could implicate the statutory independence of the IGs and subject them to the political considerations this Committee intended to insulate them from over 20 years ago.

### **Codification of Integrity and Efficiency Councils**

The Committee may wish to consider establishing the PCIE and ECIE in legislation similar to that of our affinity councils. While we are certainly grateful to the support from OMB and various resources from the IGs, such a provision would allow the PCIE and ECIE to more effectively perform its administrative and internal operations. These activities could include annual report preparation, strategic planning, various crosscutting projects, and oversight, and possibly funding, of training functions, to name a few.

The CFO Council and the Chief Information Officer (CIO) Council have statutory responsibilities and some access to Federal funds, through government credit card rebates, to carry out their operations. The PCIE and ECIE lack an OIG institutional presence. It is akin to most volunteer groups, whereby the effectiveness of the organization is dependent on the

goodwill and efforts of its members to dedicate resources within their own shops to carry out the responsibilities and initiatives of the organization.

Further, since we report to both the Executive and Legislative branches, it may be time to consider carefully how best we can fulfill both roles through some sort of statutory codification. With such a structure, the PCIE and ECIE would be held accountable for their operations and provide better access for the Congress to focus attention on areas of particular interest.

### **IG Academies and Forensic Lab**

Finally, we appreciate your continued support on a bipartisan basis to advance legislation to provide authorization for the IG Criminal Investigator Academy and the Forensic Laboratory. This legislation was incorporated in the Chairman's bill, S.1707, to move the IG from the Tennessee Valley Authority to PAS status. The authorization of both the academy and laboratory will ensure that the OIG investigators have the specialized training and necessary tools readily available to them. As you know, this legislation has passed the Senate and is pending before the House.

We would like to work with you to expand any further legislation to authorize funding for the Inspectors General Auditor Training Institute. This training facility has been offering entry-level and specialized audit training for OIG audit and audit-related staff for nearly 10 years. The Institute is supported solely by its tuition revenue and has at times been unable to expand its curriculum due to funding concerns. Authorizing funds to annually support the curriculum development and course delivery of the Inspector General Auditor Training Institute would go a long way toward enhancing OIG auditing skills.

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Mr. Chairman, this concludes my prepared statement. We again appreciate the opportunity to share with you this information and hope it will be useful to the Committee as it considers ways for improving the operations of the IG community. As always, we appreciate your support of the IG mission and community and look forward to continuing this dialogue and maintaining a constructive relationship with you. At this time, we would be happy to respond to any questions that you or other Members of the Committee may have.